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No. 1178

APR 25 1942
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

October Term, 1941.

OZARK CHEMICAL COMPANY, *Petitioner,*

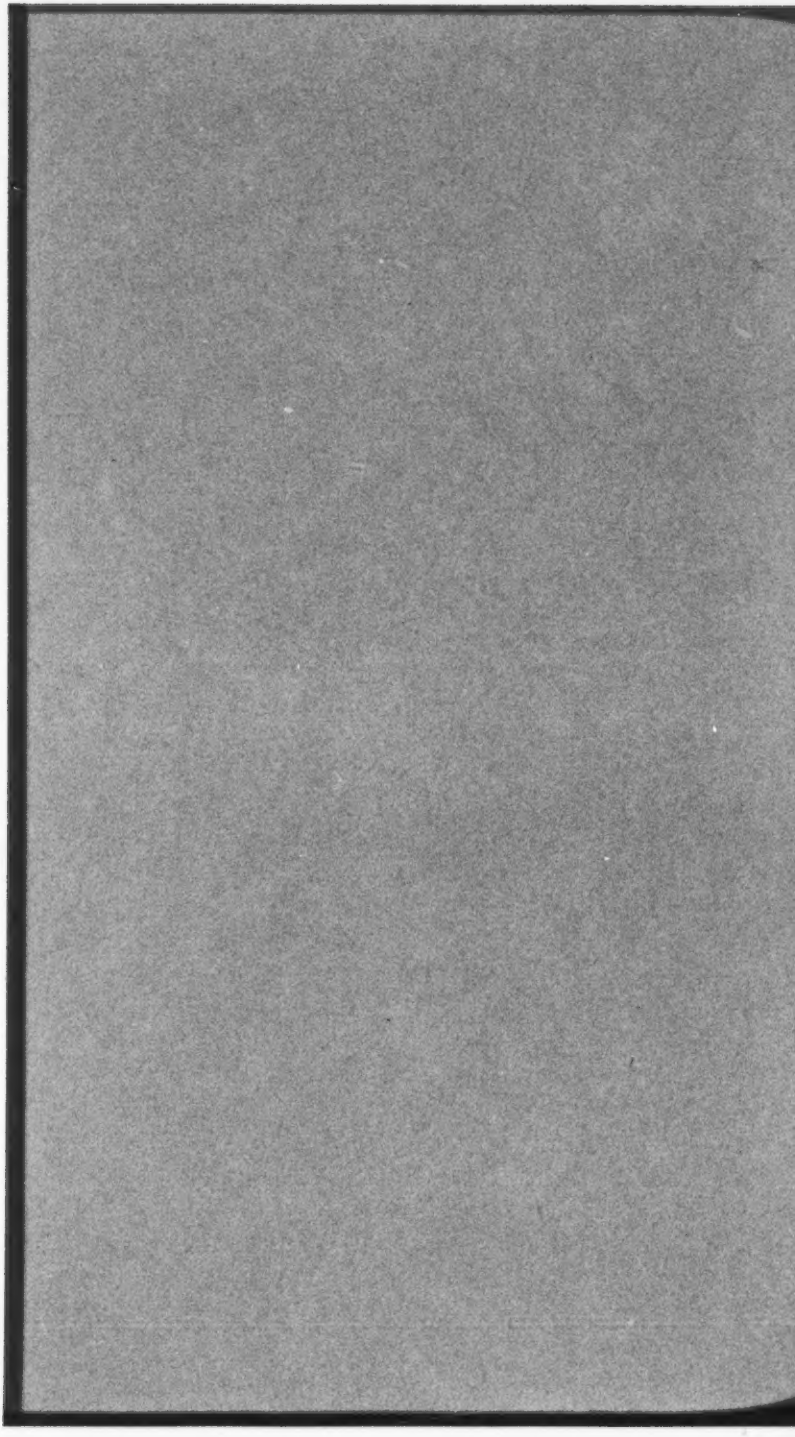
vs.

H. C. JONES, COLLECTOR OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

OZARK CHEMICAL COMPANY,
Petitioner,
By FENELON BOESCHE,
Counsel for Petitioner.

Of Counsel:
ROSCOE E. HARPER,
BRADFORD J. WILLIAMS,
RICHARD P. RYAN.



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H. C. JONES, COLLECTOR OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit in the above cause (R. 220-232).

Nature of Action.

This is an action to recover Federal Income Taxes.

Questions Presented.

The questions presented are:

(1) Whether the sodium sulphate deposit which petitioner discovered is a "mine" or "natural deposit of mineral" within the meaning of the "discovery value" depletion provisions of Sections 23(m) and 114(b)(2) of the Revenue

Act of 1934 (48 Stat. 680) and Art. 23 (m)-1(d) and 14 of Regulations 86.

(2) Whether petitioner's valuation of its deposit is supported by the evidence.

(3) Whether, if petitioner erred in fixing the discovery date, such error will result in an excessive depletion allowance to petitioner.

The first question is the only one decided in the majority opinion of the Circuit Court of Appeals for the Tenth Circuit. Circuit Judge PHILLIPS, in his dissenting opinion, found in favor of petitioner on all three questions.

These three questions may be summarized in one: Whether petitioner is entitled to a depletion deduction in its federal income tax return, for the calendar year 1935, based on the "discovery value" of the deposit of sodium sulphate which it discovered.

Sodium sulphate is a natural mineral. It occurs in nature in three forms: *(1)* in an anhydrous form known as thenardite (Na^2SO^4); *(2)* in a hydrated form known as mirabolite ($Na^2SO^4\,10H^2O$), and *(3)* in solution (Na^2SO^4 in solution).

Petitioner's sodium sulphate deposit was discovered, in its natural state, in solution. Respondent contends that sodium sulphate, which in solid form is admittedly a mineral, is not a mineral in solution. The decision of the Circuit Court of Appeals for the Tenth Circuit concedes that sodium sulphate in solution is a "natural deposit" of mineral. (R. 224)

The question, then, is whether petitioner's right to "discovery value" depletion should be denied because its deposit was found in solution rather than in solid form. In other words, should the right to "discovery value" depletion depend on whether a mineral is found in one natural state rather than another.

Summary Statement.

Petitioner is engaged in the chemical business. In 1925, it became aware of an increasing domestic demand for sodium sulphate and began a search for a natural deposit of this mineral. The United States was largely dependent on German importations. During the course of this search, petitioner examined nearly every reported deposit in the United States and Canada (R. 29, 31-34).

In 1930, petitioner sent a representative to Soda Lake, located about 12 miles south of the town of Monahans, Ward County, Texas, to examine reported sodium sulphate crystals in the bed of said lake (R. 34). The crystals were so intermixed with the mud in the lake bed that sodium sulphate could not be recovered in commercial quantities (R. 47-48).

Petitioner decided to drill below the lake bed in the hope of finding additional beds of sodium sulphate crystals (R. 48). The first hole disclosed sodium sulphate in solution containing about 5% sodium sulphate about 30 feet below the surface and another solution containing about 15% sodium sulphate about 100 feet below the surface (R. 37-38). 23 holes were drilled along the exterior boundary of an area of about 2 square miles (R. 67). Petitioner acquired approximately 2700 acres of leases, fee lands and mineral awards at a cost of approximately $2900.00 (R. 35).

In April, 1931, C. O. Anderson, Technical Director for Petitioner, made a preliminary report in which he estimated the sodium sulphate content of the 5% solution at 1,100,000 tons and of the 15% solution at 1,840,000 tons (R. 87).

Petitioner continued its exploration. It subjected the first 23 holes to pumping tests to determine how quickly the solution became exhausted and whether the sodium sulphate content decreased. These holes were pumped until the spring

of 1933 (R. 88). In the meantime, 177 additional holes were drilled inside the first 23 holes to corroborate Anderson's estimate of sodium sulphate tonnage (R. 88). The pumping tests and additional drilling indicated that Anderson's preliminary estimate was sound.

Petitioner's deposit of sodium sulphate in solution is more valuable than if it had been found in solid or crystal form (R. 39). Sodium sulphate is insoluble in very cold water as compared with the other salts with which it is found (R. 41). The only known way to recover sodium sulphate from the other salts with which it is found is to place them in solution and then force out the sodium sulphate crystals by chilling the solution. This recovery method has been known since 1767. It is described in Bulletin 646 published in 1926 by the Montana Department of Mines (R. 42).

While exploration was continuing through pumping tests and additional drilling, petitioner determined that its deposit was favorably located with respect to freight rates from source to market and low cost available fuel (R. 65). Petitioner estimated that it could recover 20,000 tons a year for about 20 years at an average cost of $6.50 a ton and sell same at an average cost of $11.00 a ton f. o. b. plant (R. 45,54). The plant was completed in May, 1933, at a cost of approximately $250,000.00 (R. 45).

Ralph E. Davis, Inc., valuation engineers, prepared a "discovery value" depletion report on petitioner's sodium sulphate deposit (R. 159-174). In its federal income tax return for the calendar year 1935, petitioner claimed a "discovery value" depletion deduction of $3,877.54 based on the sodium sulphate mined and sold that year (R. 195). This deduction was disallowed (R. 210-213). A deficiency of $626.07 was assessed and paid. Claim for refund was filed and denied (R. 122). Petitioner brought this action against respondent on said claim.

Judgment Below.

The trial court found that petitioner had discovered a deposit of sodium sulphate but that such deposit was neither a mine nor a mineral deposit and had no discovery value on the date of discovery (R. 20-26).

An appeal was taken to the United States Circuit Court of Appeals for the Tenth Circuit. The judgment below was affirmed by a divided court, Circuit Judge HUXMAN writing the majority opinion concurred in by Circuit Judge BRATTON (R. 220-224). Circuit Judge PHILLIPS wrote a vigorous dissenting opinion (R. 224-232) wherein he concluded:

> "It seems to me that under the existing emergency when discovery of new mineral deposits is so essential, we should give the statute a broad construction if its language and the applicable regulations permit thereof. I think they do.
>
> "For the foregoing reasons, I think Ozark is entitled to the depletion allowance, and respectfully dissent."

Jurisdiction of This Court to Review the Judgment Below.

(1) The jurisdiction of this court is based upon Judicial Code, Sec. 240(a), as last amended by the Act of June 7, 1934, 48 Stat. 926, U. S. C. A., Title 28, Sec. 347.

(2) This cause involves a construction of Sections 23(m) and 114(b)(2) of the Revenue Act of 1934 (48 Stat. 689, 690, 710), and Art. 23(m)-1(d) and 14 of Regulations 86.

(3) Judgment was entered December 24, 1941 (R. 220-232).

(4) Petition for rehearing was denied February 12, 1942 (R. 238).

Reasons for Granting the Petition.

(1) The decision of the Circuit Court of Appeals for the Tenth Circuit ignores the broad purpose of "discovery value" depletion (see dissenting opinion Circuit Judge PHILLIPS (R. 228, 232)). "Discovery value" depletion was granted to encourage the discovery of new mineral deposits. It has been in effect since the close of the first World War (see Congressional Record, December 17, 1918, p. 549; *Melville G. Thompson*, 10 B. T. A. 25, 30; Paul & Mertens Law of Federal Income Taxation, Vol. 2, Sec. 21.54). This same purpose caused the enactment of the Mineral Leasing Act of February 25, 1920, (41 Stat. 447) which act, incidentally, recognizes that sodium sulphate in solution is a mineral. The wisdom of this policy is demonstrated in the instant case. Petitioner discovered an essential mineral for which the United States was dependent on Germany. Today, the United States again is urging its citizens to discover new mineral deposits. The United States is paying a premium for the production of copper, lead and zinc. The mining of tungsten, quicksilver, manganese, platinum, antimony, chromite, and tin is exempt from corporate excess profits tax in the Revenue Act of 1940.

(2) The decision of the Circuit Court of Appeals for the Tenth Circuit is in conflict with Art. 23(m)-14(b), Regulations 86, issued under the authority of Sec. 23(m) of the Revenue Act of 1934. The decision states (R. 224):

> "It may be conceded, as petitioner contends, that sodium sulphate in solution is a natural deposit within the meaning of the Revenue Act."

Since 1926, the applicable regulations have allowed discovery value depletion "when (1) there is found a natural deposit of mineral." Congress has re-enacted "discovery value" depletion six times without change since 1926 (see

dissenting opinion Circuit Judge PHILLIPS (R. 229-230) and petition for rehearing (R. 233-237)).

(3) The decision of the Circuit Court of Appeals for the Tenth Circuit is in conflict with decisions of this court and other courts in analogous cases. By common usage, the word "mining" has ceased to be confined to the extraction by excavation from the earth of metals and solid minerals. It is now applied to the extraction from the earth of all substances which are classified geologically as "mineral." *In re Great Western Petroleum Corporation,* 16 Fed. Sup. 247, 249 (Dist. Ct. S. D. Cal. 1936). Subterranean waters are minerals. *Hathorn* v. *Natural Carbonic Gas Co.,* 194 N. Y. 326, 87 N. E. 504, 508 (N. Y. Ct. App. 1909). Natural gas is a mineral. *Osborn* v. *Arkansas Territorial Oil & Gas Co.,* 103 Ark. 175, 146 S. W. 122, 129 (1912). Oil is a mineral and its extraction by means of a well is mining. *Burke* v. *Southern Pacific Railway Co.,* 234 U. S. 669 (1913). Mining connotes the removal of minerals from a natural deposit. *Atlas Milling Co.* v. *Jones,* 115 F. (2d) 61, 63 (C. C. A. 10th, 1940).

(4) The Circuit Court of Appeals for the Tenth Circuit has decided an important question of federal income tax law which has not been, but should be, settled by this court. The question presented here is one of first impression and is of growing importance under the "discovery value" depletion provisions of all Revenue Acts since 1918 because of increasing discoveries of minerals in solution.

Petitioner presents herewith a certified transcript of the record in this case in the Circuit Court of Appeals for the Tenth Circuit.

Wherefore, petitioner respectfully submits that this petition should be granted.

OZARK CHEMICAL COMPANY,
Petitioner,

FENELON BOESCHE,
Counsel for Petitioner.

Of Counsel:
ROSCOE E. HARPER,
BRADFORD J. WILLIAMS,
RICHARD P. RYAN.

CERTIFICATE OF COUNSEL.

I, one of counsel for the above named petitioner, do hereby certify that I have read the foregoing petition for writ of *certiorari* and that in my opinion such petition is well founded and is entitled to the favorable consideration of the court.

FENELON BOESCHE.